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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRANKLIN M. WRIGHT, Administrator of the Estate of CHRISTINE WRIGHT, Deceased,

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. and CHRISTOPHER WALLS, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF RESPONDENTS WILLIAM A. DAVIS, M.D. AND DAVID GREENE, M.D. IN OPPOSITION

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48 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether this Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) to grant a writ of certiorari, when no court of the State of Georgia in the proceedings below passed upon or addressed in any manner the constitutionality of the Georgia statute at issue, O.C.G.A. § 9-11-9.1, under the United States Constitution.

(2) Notwithstanding the lack of jurisdiction, whether any issue deserving of this Court's consideration is presented regarding the constitutionality of O.C.G.A. § 9-11-9.1.

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OPINIONS AND ORDERS BELOW

There has been a total of seven opinions and/or orders issued by the Georgia courts below, to wit: (1) Order of the Superior Court of Fulton County, Georgia, granting Respondents' motions to dismiss, dated September 13, 1991; (2) Order of the Supreme Court of Georgia transferring the appeal to the Court of Appeals of Georgia for lack of jurisdiction, dated February 12, 1992; (3) Order of the Supreme Court

of Georgia denying Petitioner's motion for reconsideration, dated March 12, 1992; (4) Opinion of the Court of Appeals of Georgia, dated September 8, 1992, reported at 205 Ga. App. 653, 423 S.E.2d 12 (1992); (5) Order of the Court of Appeals of Georgia denying Petitioner's motion for reconsideration, dated October 1, 1992; (6) Denial of petition for certiorari of the Supreme Court of Georgia, dated September 8, 1993; and (7) Order of the Supreme Court of Georgia denying Petitioner's motion for reconsideration, dated October 1, 1993. The full text of each of these opinions and orders is reproduced in Respondents' Appendix. In none of these opinions or orders did the Georgia courts address in any manner the constitutional challenges to O.C.G.A. § 9-11-9.1 that Petitioner seeks to raise before this Court.

JURISDICTIONAL STATEMENT

As discussed more fully below, this Court is without jurisdiction to grant a writ of certiorari, because no Georgia court in the proceedings below ever passed upon or addressed in any manner the constitutionality of O.C.G.A. § 9-11-9.1 under the United States Constitution. Accordingly, the jurisdictional requirements of 28 U.S.C. § 1257(a) are absent in this case, and the Petition is subject to dismissal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The texts of the constitutional provisions that Petitioner contends are involved are set forth in Petitioner's Appendix at F1-F4. Respondents take the position that none of these constitutional provisions is involved, as the constitutional attacks to O.C.G.A. § 9-11-9.1 raised in the Petition were never addressed by any Georgia court in the proceedings

below, and therefore, are not subject to this Court's review. The only statutes that are involved are 28 U.S.C. § 1257 and O.C.G.A. § 9-11-9.1 of the Georgia Civil Practice Act, which are set forth verbatim below.

28 U.S.C. § 1257. State courts; certiorari.

> a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

O.C.G.A. § 9-11-9.1. Affidavit to accompany charge of professional malpractice.

> (a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.
>
> (b) The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case

in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.

(c) If an affidavit is filed after the filing of a complaint, as allowed under subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

(d) This Code section shall not be construed to extend any applicable period of limitation.

(e) Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this Code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

STATEMENT OF THE CASE

This Petition arises out of a medical malpractice action filed on June 27, 1991 in the Superior Court of Fulton County, Atlanta, Georgia, alleging that Respondents negligently placed a guide wire used to aid in the insertion of a central line catheter in Christine Wright's body on July 4, 1989 and that such wire was improperly left in her body, resulting in complications and injury. Petitioner attached the transcript of a deposition of Pamela Benitez, M.D. to the Complaint in support of the allegations. This deposition was taken in an action which pended in the Circuit Court for the County of Wayne, Michigan, and did not involve any of the Respondents. Further, the deposition did not mention any of the Respondents by name and did not specifically set forth any negligent acts or omissions alleged to have been committed by any of the Respondents, as required by O.C.G.A. § 9-11-9.1. Moreover, Dr. Benitez specifically stated in her deposition that she had not read or even seen any of the medical records of the care rendered by any of the Respondents. Therefore, this testimony could provide no factual basis for any allegations of negligence regarding the care and treatment rendered by Respondents.

Petitioner's Complaint failed to state, in accordance with the provisions of O.C.G.A. § 9-11-9.1(b), that the action was filed within ten (10) days of the expiration of the statute of limitation and, as a result, the affidavit of an expert could not be prepared. This statement would have entitled Petitioner to an additional forty-five (45) days after the filing of the Complaint within which to supplement the Complaint with the appropriate affidavit.

On July 1, 1991, Petitioner purported to file an amendment to the Complaint setting forth this language from the

statute in an effort to trigger the protections of O.C.G.A. § 9-11-9.1(b). By a purported second amendment to the Complaint filed on August 7, 1991, Petitioner sought to incorporate the affidavit of Jose L. Evangelista, M.D. to the initial Complaint filed on June 27, 1991.

In August and September, 1991, Respondents filed separate motions to dismiss Petitioner's Complaint on the ground that Petitioner had failed to comply with the provisions of O.C.G.A. § 9-11-9.1. On September 2, 1991, Petitioner responded to these motions by claiming that the deposition transcript of Dr. Benitez was sufficient to meet the requirements of O.C.G.A. § 9-11-9.1 and alleging that the statute did not require a contemporaneous statement with the filing of the Complaint that Petitioner was unable to prepare an affidavit due to time constraints created by the statute of limitation. Instead, Petitioner argued that this language could be added by amendment under O.C.G.A. § 9-11-15.

On September 11, 1991, Petitioner filed a supplemental response to one of the Respondents' motions to dismiss and alleged, for the first time, that O.C.G.A. § 9-11-9.1 violated Article III, Section V, Paragraph III of the Constitution of the State of Georgia which prohibits a statute from referring to more than one subject matter or containing matter different from what is expressed in the title thereof. No other constitutional challenge was asserted by Petitioner in the trial court.

On September 13, 1991, the Superior Court of Fulton County, Georgia, issued an order granting Respondents' motions to dismiss. (Appendix at A1). The trial court's order did not mention or address the constitutional attack raised by Petitioner in the supplemental response.

Petitioner then proceeded to file a notice of appeal to the Supreme Court of Georgia on October 2, 1991. On February 12, 1992, the Georgia Supreme Court issued an order containing only one sentence which read: "There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals." (Appendix at B1). Petitioner then filed a motion for reconsideration with the Georgia Supreme Court regarding its order transferring the appeal. In a one-sentence order dated March 12, 1992, the Georgia Supreme Court denied Petitioner's motion for reconsideration. (Appendix at C1).

Following the Georgia Supreme Court's denial of reconsideration, the appeal was docketed in the Court of Appeals of Georgia. Even though not raised in the trial court, Petitioner attempted to expand the constitutional attacks to O.C.G.A. § 9-11-9.1 in the Court of Appeals by arguing, for the first time, that the statute also violated the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia. On September 8, 1992, the Georgia Court of Appeals rendered its opinion affirming the trial court's order dismissing the Complaint for failure to comply with O.C.G.A. § 9-11-9.1. With regard to Petitioner's constitutional challenges, the Court of Appeals held the following: "Since the trial court did not rule on appellant's [Petitioner's] contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990)." (Appendix at D1).

On September 28, 1992, Petitioner filed a motion for reconsideration with the Georgia Court of Appeals. The Court of Appeals denied Petitioner's motion in a one-sentence order issued on October 1, 1992. (Appendix at E1).

Thereafter, Petitioner filed a petition for certiorari with the Georgia Supreme Court on October 20, 1992. Included in the petition were challenges to the constitutionality of O.C.G.A. § 9-11-9.1 under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section I, Paragraphs I and II and Article III, Section V, Paragraph III of the Constitution of the State of Georgia. Declining to review the case, the Georgia Supreme Court denied the petition for certiorari in a one-sentence order dated September 8, 1993. (Appendix at F1). Petitioner then filed a motion for reconsideration with the Supreme Court on September 17, 1993, raising, for the first time, an attack to the preamble to the Georgia Constitution. On October 1, 1993, the Supreme Court issued another one-sentence order denying Petitioner's motion for reconsideration. (Appendix at G1).

Contrary to Petitioner's contentions, no Georgia court below ever expressly or implicitly addressed the constitutionality of O.C.G.A. § 9-11-9.1, either under the United States Constitution or the State of Georgia Constitution. The opinions and orders previously discussed and set forth verbatim in the Appendix hereto evidence the absence of such state judicial review.

SUMMARY OF ARGUMENT FOR DISMISSING OR DENYING THE WRIT

No Georgia court in the proceedings below ever passed upon or addressed the constitutional challenges which Petitioner seeks to raise before this Court. Therefore, this Court is without jurisdiction under 28 U.S.C. § 1257(a) to grant a writ of certiorari, and the Petition should be dismissed accordingly. Even assuming, *arguendo*, that jurisdiction in this Court is established, the Petition should be denied because no

issue deserving of this Court's consideration is presented regarding the constitutionality of O.C.G.A. § 9-11-9.1.

ARGUMENT FOR DISMISSING OR DENYING THE WRIT

I. THIS COURT IS WITHOUT JURISDICTION PURSUANT TO 28 U.S.C. § 1257(a) TO GRANT A WRIT OF CERTIORARI BECAUSE NO GEORGIA COURT IN THE PROCEEDINGS BELOW EVER PASSED UPON OR ADDRESSED THE CONSTITUTIONAL CHALLENGES RAISED IN THE PETITION FOR CERTIORARI.

This Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257(a), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In applying 28 U.S.C. § 1257(a), this Court has repeatedly held that unless a federal question has been both raised and decided in the state courts below, the jurisdiction of this

Court fails. *E.g., Illinois v. Gates*, 462 U.S. 213, 218-219 (1983), and cases cited therein; *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160-161 (1945); *Mellon v. O'Neil*, 275 U.S. 212, 214 (1927). *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988).

The rationale for this rule, sometimes called the "not pressed or passed upon below" rule, has been addressed by this Court on numerous occasions. In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940), the Court observed:

> In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

See Gates, 462 U.S. at 218-219. Further, this Court has noted that "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly

was not compiled with those questions in mind." *Gates*, 462 U.S. at 221; *Cardinale*, 394 U.S. at 439. Moreover, this Court has stated that "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground." *Cardinale*, 394 U.S. at 439. *See Gates*, 462 U.S. at 221-222; *Webb v. Webb*, 451 U.S. 493, 499-501 (1981); *Hill v. California*, 401 U.S. 797, 805-806 (1971).

In the present case, no Georgia court in the proceedings below ever expressly or implicitly passed upon the constitutionality of O.C.G.A. § 9-11-9.1, either under the United States Constitution or the Georgia Constitution. In the very first order issued in this case, the September 13, 1991 order of the Superior Court of Fulton County, Georgia, the trial court did not mention, let alone decide, any constitutional issue. (Appendix at A1). In the February 12, 1992 order of the Georgia Supreme Court, the highest court of the State of Georgia expressly held that it had no basis for jurisdiction and transferred the appeal to the Georgia Court of Appeals. (Appendix at B1). By transferring the appeal to the Court of Appeals for lack of jurisdiction, the Georgia Supreme Court in no way addressed the constitutionality of O.C.G.A. § 9-11-9.1. Likewise, the Georgia Supreme Court's March 12, 1992 order denying Petitioner's motion for reconsideration did not serve as a judicial decision on the constitutionality of the state statute. (Appendix at C1).

As demonstrated by the Georgia Court of Appeals' September 8, 1992 opinion, the court never passed upon any constitutional challenge to O.C.G.A. § 9-11-9.1. With regard to Petitioner's federal and state constitutional challenges, the Georgia Court of Appeals succinctly held: "Since the trial

court did not rule on appellant's [Petitioner's] contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990)." (Appendix at D1). Thus, the constitutionality of the state statute was neither expressly nor implicitly addressed in this opinion. Similarly, no judicial review was given by the Georgia Court of Appeals in its October 1, 1992 order denying Petitioner's motion for reconsideration. (Appendix at E1).

When the case reached the Georgia Supreme Court for the second time via a petition for certiorari, the state's highest court again did not pass upon any constitutional challenges to O.C.G.A. § 9-11-9.1. By denying certiorari pursuant to its order dated September 8, 1993, the Georgia Supreme Court declined to review any issues whatsoever. (Appendix at F1). It is well settled that a denial of a writ of certiorari carries with it no implication whatever regarding the court's views of the merits of the case. *E.g., Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950). *See Adair v. Traco Division*, 192 Ga. 59, 64, 14 S.E.2d 466 (1941). Thus, the denial of certiorari by the Georgia Supreme Court carries with it no implication whatever regarding its views of the constitutionality of O.C.G.A. § 9-11-9.1. The same holds true with respect to the Supreme Court's denial of Petitioner's motion for reconsideration on October 1, 1993. (Appendix at G1).

As with the constitutionality of O.C.G.A. § 9-11-9.1, no Georgia court below ever addressed any constitutional challenge to the preamble to the State of Georgia Constitution. This issue was not even raised until after the Georgia Supreme Court had already denied certiorari, when Petitioner filed a motion for reconsideration with the Georgia Supreme Court on September 17, 1993.

Because no Georgia court below ever passed upon or addressed in any manner the constitutional issues raised in the Petition, this Court is without jurisdiction to grant a writ of certiorari. Therefore, the Petition is subject to dismissal.

With regard to the lack of judicial review of the constitutional issues below, this Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presention in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb*, 451 U.S. at 495-496, and cases cited therein; *Street v. New York*, 394 U.S. 576, 582 (1969). In the present case, neither the Georgia Supreme Court nor Court of Appeals ruled on any federal question concerning the constitutionality of O.C.G.A. § 9-11-9.1 or the preamble to the Georgia Constitution. As shown below, this was so because no such issue was ever properly presented for review. Petitioner has failed to show otherwise.

Petitioner's purported constitutional attacks on O.C.G.A. § 9-11-9.1 were not subject to appellate review in Georgia because they were never addressed by the trial court. It is well established that the Georgia appellate courts "will never pass upon the constitutionality of an act of the General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and *distinctly passed on by the trial judge*. *Brown v. State*, 114 Ga. 60(2) (39 S.E. 873); *Georgia-Florida Ry. v. Newton*, 140 Ga. 463(3) (79 S.E. 142); *Bentley v. Anderson-McGriff Hardware Co.*, 181 Ga. 813(1) (184 S.E. 297); *West v. Frick Co.*, 183 Ga. 182 (187 S.E. 868)." *Calhoun v. State*, 211 Ga. 112, 113, 84 S.E.2d 198, 199-200 (1954) (emphasis added); *Archie v. Scott*, 190 Ga. App. 145, 146, 378 S.E.2d 182, 184 (1989); *Philyaw v. Fulton National Bank*, 139 Ga. App. 28, 29, 227 S.E.2d 811, 812 (1976). This

result is the same whether the constitutional issue was intentionally or unintentionally omitted by the trial court. *See Willingham v. Lee*, 227 Ga. 425, 181 S.E.2d 49 (1971) *(quoting Dunaway v. Gore*, 164 Ga. 219, 230, 138 S.E. 213 (1927)). Merely raising a constitutional issue, which is not distinctly passed upon in the trial court, is insufficient to constitute a basis for an enumeration of error on appeal. *Calhoun*, 211 Ga. at 113, 84 S.E.2d at 200.

Petitioner first raised a constitutional challenge to O.C.G.A. § 9-11-9.1 at the trial level in a supplemental response to one of Respondents' motions to dismiss. Petitioner's *sole* ground of attack was that O.C.G.A. § 9-11-9.1 was allegedly unconstitutional because it violated the multiple subject prohibition of the Georgia Constitution. Ga. Const. art. III, § V, ¶ III. In its order granting Respondents' motions to dismiss, the trial court did not mention, much less address, this constitutional issue. (Appendix at A1). Consequently, this constitutional challenge was not subject to review by the Georgia Supreme Court or Court of Appeals. *See Calhoun*, 211 Ga. at 113, 84 S.E.2d at 199-200, and cases cited therein; *Archie*, 190 Ga. App. at 146, 378 S.E.2d at 184; *Philyaw*, 139 Ga. App. at 29, 227 S.E.2d at 812. Further, Petitioner's federal challenges to O.C.G.A. § 9-11-9.1 based on the Fifth and Fourteenth Amendments to the United States Constitution and additional state constitutional challenges based on Article I, Section I, Paragraphs I and II of the Georgia Constitution were clearly not subject to appellate review by the Georgia Supreme Court or Court of Appeals, because these constitutional attacks were never even raised by Petitioner in the trial court. *Id. See Stembridge v. Georgia*, 343 U.S. 541, 547 (1952) (this Court recognized the principle under Georgia law that constitutional questions must first be raised in the trial court in order to be reviewed on appeal). Similarly, the challenge to the preamble to the Georgia Constitution was not subject to appellate review in Georgia,

as it was never raised in the trial court or even the Georgia Court of Appeals, and moreover, was not raised in the Georgia Supreme Court until after that court had already denied certiorari. *Id.*

Although Petitioner attempted to raise certain federal (i.e., Fifth and Fourteenth Amendments) and state constitutional challenges to O.C.G.A. § 9-11-9.1 in the Georgia Court of Appeals, that court was without jurisdiction to decide any such constitutional issues. The Constitution of the State of Georgia vests exclusive appellate jurisdiction in the Georgia Supreme Court over "[a]ll cases involving the construction of . . . the Constitution of the State of Georgia . . . and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question . . . ." Ga. Const. art. VI, § VI, ¶ II(1). This constitutional provision was applied in *Burson v. State*, 183 Ga. App. 647-648, 359 S.E.2d 731-732 (1987), where the Georgia Court of Appeals held that it had no authority to determine the constitutionality of a State statute. The *Burson* holding is particularly relevant because in that case, as in this case, the Georgia Supreme Court had transferred the appeal to the Court of Appeals, and further, the Georgia Supreme Court had not yet ruled on the constitutionality of the statute in question, as was true with respect to O.C.G.A. § 9-11-9.1.

Only the Georgia Supreme Court had jurisdiction to consider Petitioner's constitutional challenges. Ga. Const. art. VI, § VI, ¶ II(1). That court, however, declined to exercise such jurisdiction by first transferring the case to the Court of Appeals and later denying certiorari. As shown above, the failure of the Georgia Supreme Court to pass upon the constitutionality of O.C.G.A. § 9-11-9.1 and the preamble to the Georgia Constitution was due to the want of proper presentation below. *See Webb*, 451 U.S. at 495-496; *Street*, 394 U.S. at 582.

Further, with respect to the failure of the Georgia Supreme Court to pass upon these constitutional issues, this Court has held: "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge*, 343 U.S. at 547, and cases cited therein (emphasis in original). In the instant case, the Georgia Supreme Court delivered no opinion whatsoever and the judgment unquestionably rested on a nonfederal ground, as no federal constitutional issue was ever addressed by any Georgia court below. Thus, jurisdiction in this Court does not exist. *See Id.*

At each step in the Georgia appellate process, Petitioner attempted to add a new theory not previously raised in the hope that the case would be reviewed. Petitioner has taken the same approach in this Court with the challenge to O.C.G.A. § 9-11-9.1 based upon the Seventh Amendment to the United States Constitution. This issue was never raised at any level in the proceedings below, much less passed upon. Rather, Petitioner asserted this purported constitutional issue for the first time in its December 27, 1993 Petition for a Writ of Certiorari filed with this Court. Because Petitioner never raised this federal claim at any point in the State court proceedings, this issue is not subject to this Court's certiorari jurisdiction. *See, e.g., Monks v. New Jersey*, 398 U.S. 71-72 (1970) (petitioner could not raise, for first time on writ of certiorari to United States Supreme Court, constitutional issue upon which state courts had no opportunity to pass); *Stembridge*, 343 U.S. at 546[1]. *See also Bankers Life*, 486 U.S. at 76-78; *Gates*, 462 U.S. at 218-224; *Webb*, 451 U.S. at 494-502; *Street*, 394 U.S. at 581-582; *Cardinale*, 394 U.S. at 438-439; *Bailey*, 326 U.S. at 206-207.

For all the foregoing reasons, this Court is without jurisdiction under 28 U.S.C. § 1257(a) to grant a writ of certiorari. The Petition should be dismissed accordingly.

II. NOTWITHSTANDING THE LACK OF JURISDICTION, THE PETITION FOR CERTIORARI PRESENTS NO ISSUE DESERVING OF THIS COURT'S CONSIDERATION REGARDING THE CONSTITUTIONALITY OF O.C.G.A. § 9-11-9.1.

Even assuming, *arguendo*, that jurisdiction in this Court is proper under 28 U.S.C. § 1257, the Court should deny the Petition for a Writ of Certiorari, as O.C.G.A. § 9-11-9.1 is so clearly within constitutional bounds that no federal question deserving of this Court's consideration exists.

The Petition appears to raise three challenges to O.C.G.A. § 9-11-9.1 under the United States Constitution. It alleges that the statute violates: (1) Petitioner's right to due process, as guaranteed by the Fifth Amendment to the United States Constitution; (2) Petitioner's right to trial by jury, as set out in the Seventh Amendment; and (3) Petitioner's right to equal protection, as guaranteed by the Fourteenth Amendment. Notwithstanding the fact that these issues were never passed upon by a Georgia court below, these challenges do not raise any meritorious issue for this Court's consideration.

Petitioner's claim that O.C.G.A. § 9-11-9.1 violates due process is without merit. Initially, it must be noted that no suspect class or fundamental right is involved in this case, so the statute is not subject to strict scrutiny as Petitioner appears to contend. *See Dandridge v. Williams*, 397 U.S. 471 (1970). Rather, the proper test for measuring the constitutionality of O.C.G.A. § 9-11-9.1 is the "rational relationship" test: if the goals sought by legislation are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the legislation complies with the due process clause of the Fifth Amendment. *See, e.g., Richardson*

v. Belcher, 404 U.S. 78 (1971). The purpose of O.C.G.A. § 9-11-9.1 is to reduce the number of frivolous professional malpractice suits being filed. *E.g., Housing Authority of Savannah v. Greene*, 259 Ga. 435, 439, 383 S.E.2d 867, 870 (1989) (*quoting 0-1 Doctors Memorial Holding Co. v. Moore*, 190 Ga. App. 286, 288, 378 S.E.2d 708, 710 (1989)); *Bowen v. Adams*, 203 Ga. App. 123, 124, 416 S.E.2d 102, 103 (1992). This is a legitimate goal of the Georgia Legislature, as it promotes efficiency and judicial economy and minimizes the wasteful expenditure of the State courts' time, effort and economic resources. The affidavit requirement of the statute compels potential professional malpractice plaintiffs and their attorneys to conduct a minimal factual investigation prior to filing suit, helping to ensure that each case filed has, at the very least, arguable merit. In this way, the statute furthers the legitimate legislative goal, and therefore, is "rationally related" to it.

In this regard, this case is similar to *Jones v. Union Guano Co.*, 264 U.S. 171 (1923), a suit against a fertilizer company in which this Court examined a state law that required a chemical analysis of fertilizer to be performed before a suit could be filed alleging damages to crops resulting from use of the fertilizer. In holding that the statute in question complied with the due process and equal protection requirements of the United States Constitution, this Court stated, "The 14th Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object." 264 U.S. at 181. The Court in *Jones* found that in the particular lawsuits at issue, it was factually difficult to pinpoint the specific cause of a poor result. *Id.* Therefore, the chemical analysis prerequisite provided "a more definite method of ascertaining the essential facts, and a better basis upon which judicial determinations . . . [could] be made." *Id.*

The same applies to the affidavit requirement of O.C.G.A. § 9-11-9.1. In professional malpractice actions, expert testimony is necessary to establish the parameters of the standard of care and to show a deviation from that standard. The affidavit requirement of O.C.G.A. § 9-11-9.1 is reasonably related to achieving the State's legitimate goal of reducing the number of frivolous lawsuits. The Georgia statute therefore poses no due process violation.

Petitioner's allegations that O.C.G.A. § 9-11-9.1 violates the right to a trial by jury under the Seventh Amendment to the United States Constitution are without merit. This Amendment applies to suits in federal court and is not extended to suits in state courts. *Eilenbecker v. Plymouth Co.*, 134 U.S. 31 (1890); *O'Connor v. Nevada*, 507 F.Supp. 546 (D. Nev. 1981), *aff'd*, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071; *Iacaponi v. New Amsterdam Cas. Co.*, 258 F.Supp. 880 (D. Pa. 1966), *aff'd*, 379 F.2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054. Thus, Petitioner's references to the Seventh Amendment to the United States Constitution are misplaced.

Furthermore, O.C.G.A. § 9-11-9.1 complies with the equal protection provisions of the Fourteenth Amendment to the United States Constitution. In *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), this Court enunciated the standard of review for equal protection analysis as follows:

> [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [cits. omitted] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute

> into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." [cit. omitted]

As previously discussed, O.C.G.A. § 9-11-9.1 passes this "rational relationship" test. Its purpose is to reduce the number of frivolous professional malpractice suits being filed. *E.g., Greene*, 259 Ga. at 439, 383 S.E.2d at 870; *Bowen*, 203 Ga. App. at 124, 416 S.E.2d at 103. The requirement that a professional malpractice plaintiff file an expert affidavit with the complaint setting forth at least one negligent act or omission is reasonable and bears a fair and substantial relationship to the object of this statute. It accomplishes this objective by requiring the plaintiff to show at the outset of the litigation that a frivolous suit is not being filed.

The Georgia Supreme Court has repeatedly upheld a separate classification of medical malpractice actions as a rational exercise of legislative power presenting no equal protection or due process violation. *Hamby v. Neurological Associates, P.C.*, 243 Ga. 698, 256 S.E.2d 378 (1979) (separate classification of two-year statute of limitation for medical malpractice loss of consortium claims, as opposed to four-year statute of limitation applying to all other loss of consortium claims upheld); *Perry v. Atlanta Hospital & Medical Center, Inc.*, 255 Ga. 431, 339 S.E.2d 264 (1986) (same classification as in *Hamby, supra*, upheld); *Allrid v. Emory University*, 249 Ga. 35, 38-39, 285 S.E.2d 521, 524-525 (1982) (separate classification between medical malpractice statute of limitation for foreign object cases and all other medical malpractice cases upheld). Likewise, the separate classification of medical malpractice actions under

O.C.G.A. § 9-11-9.1 presents no equal protection or due process violation.

Petitioner's predicament in this case did not arise from a denial of due process, but rather, from a failure to properly exercise rights under Georgia law. Instead of filing the required affidavit contemporaneously with the Complaint, Petitioner filed a deposition taken in another case, which did not mention any of the Respondents by name, set out the parameters of the standard of care, or allege any particulars of how any of the Respondents deviated therefrom. Moreover, the deponent admitted that she had not reviewed any medical records pertaining to the care provided by the Respondents. As this Court recognized in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication . . . . And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." Petitioner would have had an opportunity to present the merits of the case to a jury had Petitioner properly followed the reasonable procedure established by the Georgia Legislature. O.C.G.A. § 9-11-9.1 does not violate any of the Constitutional provisions that Petitioner attempts to invoke.

Petitioner mentions several theories upon which Petitioner fails to expand. The first "question presented" in the Petition appears to raise some sort of federalism issue regarding the preamble to the Georgia Constitution. Petitioner, however, fails to show how this preamble had any impact on this case. Petitioner also claims that this case involves diversity of citizenship. This is a non-issue. It is difficult to ascertain the purpose for invoking this artifact, as the Petitioner, being the plaintiff below, voluntarily invoked the jurisdiction of the Georgia State court by filing the Complaint

therein, instead of in federal court where diversity may have some application. In addition, Petitioner's assertion that the Georgia Constitution gives greater weight to Georgia citizens than those of other states is without legal or factual support. There is no showing of any preferential or differential treatment provided to Georgia citizens but denied to Petitioner.

Because O.C.G.A. § 9-11-9.1 does not violate the United States Constitution in any respect, there is no federal issue to trigger this Court's review on certiorari.

CONCLUSION

There has been no judicial review of the constitutionality of O.C.G.A. § 9-11-9.1 by any Georgia court below, much less the highest state court as required by 28 U.S.C. § 1257(a). The Georgia Supreme Court declined to review the entire case on appeal, including any of Petitioner's constitutional challenges. The Georgia Court of Appeals was without jurisdiction to review any such constitutional issues. Petitioner's constitutional challenges were not subject to appellate review by either the Georgia Supreme Court or Court of Appeals as they were never passed upon or addressed in any manner by the trial court. More specifically, Petitioner's federal constitutional attacks based on the Fifth, Seventh and Fourteenth Amendments to the United States Constitution were not subject to review by either Georgia appellate court because they were not even raised by Petitioner in the trial court. Consequently, this Court is without jurisdiction to grant a writ of certiorari, and the Petition should be dismissed accordingly. Notwithstanding the lack of jurisdiction, O.C.G.A. § 9-11-9.1 clearly complies with the United States Constitution, so no federal question deserving of this Court's consideration is presented. Therefore, certiorari should be denied in any event.

DATED: January 27, 1994
Atlanta, Georgia

Respectfully submitted,

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Counsel of Record

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APPENDIX

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APPENDIX A1

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	FILE NO. D-90848
vs.	:	
	:	
CRAWFORD LONG HOSPITAL	:	
OF EMORY UNIVERSITY,	:	
JOHN K. SCHELLACK, M.D.,	:	
CHRISTOPHER DOOLEY, M.D.,	:	
M. EDWYN HARRISON, III, M.D.,	:	
WILLIAM A. DAVIS, M.D.,	:	
DAVID GREEN, M.D. and	:	
CHRISTOPHER WALLS, M.D.,	:	
	:	
Defendants.	:	

ORDER

Upon full consideration of the record, Defendants' Motion to Dismiss is hereby GRANTED.

Plaintiff filed this medical malpractice action against Crawford Long Hospital as well as six doctors alleging that the Defendants failed to remove an introducer wire used during the insertion of a central line catheter in Plaintiff's body on July 4, 1989. The Plaintiff

filed with her Complaint a deposition of Pamela Benitez, M.D., however, the Complaint did not include the expert affidavit required by O.C.G.A. § 9-11-9.1(a). Neither did the Plaintiff's Complaint allege that due to time constraints an expert affidavit could not be prepared and that Plaintiff would need the extra 45 days permitted by O.C.G.A. § 9-11-9.1(b).

On July 1, 1991, in an attempt to comply with the O.C.G.A. § 9-11-9.1 requirement, the Plaintiff filed an amended Complaint stating that due to time constraints an expert affidavit could not be prepared and filed contemporaneously with the Complaint. On August 7, 1991, a second amended Complaint was filed with the required expert affidavit attached.

We have no choice but to dismiss this Complaint for failure to fulfill the contemporaneous filing requirements. Under O.C.G.A. § 9-11-9.1(e) Plaintiff's first and second amendments to the original Complaint cannot cure this defect.

Plaintiff responds to this Motion to dismiss by contending that first, the statute does not by its terms require a contemporaneous allegation of unavailability and second, the deposition attached to the original Complaint was sufficient to satisfy the requirements of O.C.G.A. § 9-11-9.1. With both these contentions we disagree.

Section b of O.C.G.A. 9-11-9.1 states, "The contemporaneous filing requirement of subsection (a) of

this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared." The language of the statute reads very clearly. The requirement that the Plaintiff allege that time constraints have prevented the contemporaneous filing of an affidavit with the Complaint is mandatory, not permissive.

The Plaintiff's contention that the deposition attached to the original Complaint was sufficient to satisfy the affidavit requirements of O.C.G.A. § 9-11-9.1 must also fail. O.C.G.A. § 9-11-9.1(a) states, "In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."

The deposition attached to Plaintiff's original Complaint does not set forth the factual basis for the claim of malpractice. In fact, the deposition never mentions the particular Defendants involved in this case, let alone the acts of negligence they are alleged to have performed. The deposition of Dr. Benitez merely states that an introducer wire was left in the Plaintiff's body and that failure to remove this wire in a patient upon withdrawal of a CVP line violates the standard of care generally accepted in the community. Dr. Benitez never states that she has reviewed the work performed by the

particular Defendants in this matter and that their acts or failure to act fell below the standard of care generally accepted in the community. Allowing this particular deposition to fulfill the requirements of O.C.G.A. § 9-11-9.1 would undermine the public policy of the statute which is "to require the plaintiff to 'set forth the particulars of the claim'" in order to prevent frivolous or unsustainable malpractice actions. (cits.) *Cheeley v. Henderson*, 197 Ga. App. 543 (1990) reversed on other grounds, _____ Ga._____ (1991).

We therefore GRANT the Defendant's Motion for Summary Judgment and DISMISS the Plaintiff's Complaint for failure to comply with O.C.G.A. § 9-11-9.1.

This 13th day of SEPTEMBER, 1991.

/s/ Joel J. Fryer
JUDGE, FULTON SUPERIOR COURT, A.J.C.

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APPENDIX B1

Case No. S92A0520

SUPREME COURT OF GEORGIA

ATLANTA February 12, 1992

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

From the SUPERIOR COURT of FULTON County.

There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals. Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham, Fletcher, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Lynn M. Stinchcomb, Deputy Clerk.

APPENDIX C1

SUPREME COURT OF GEORGIA

ATLANTA MARCH 12, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S92A0520

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Joline B. Williams, Clerk.

APPENDIX D1

FIRST DIVISION
SOGNIER, C.J.
McMURRAY, P.J., COOPER, J.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985)

SEPT 8, 1992

In the Court of Appeals of Georgia
A92A0964. WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY et al. S-63

SOGNIER, Chief Judge.

Christine Wright bought [sic] a medical malpractice claim against Crawford Long Hospital and six physicians. Her complaint, as amended, was dismissed for noncompliance with OCGA § 9-11-9.1, and she appeals.

In her complaint appellant alleged that defendants were liable for damages she incurred when an introducer wire was left in her body during catheterization procedures performed in July 1989. Appellant attached to her complaint the deposition of Dr. Pamela Benitez, the surgeon who discovered and removed the wire in December 1989. In this deposition, which was

given in a Michigan lawsuit, Dr. Benitez testified that leaving a broken catheter threader wire in a patient's body violated the applicable standard of care. However, Dr. Benitez also stated that the wire she removed was not the kind of wire used to thread a catheterization line and that she did not recognize the type of wire and was unable to identify a medical procedure in which such a wire would be used. In addition, Dr. Benitez testified that she had not reviewed appellant's medical records pertaining to the procedures performed by appellees and did not know the names of appellant's Georgia physicians.

Four days after filing her complaint, appellant amended it to allege that the statute of limitation would expire within ten days of filing and that because of this time constraint she was unable to obtain the required affidavit before filing the complaint. Appellees raised the issue of noncompliance with OCGA § 9-11-9.1 in their answers and motions to dismiss. In her second amendment to the complaint, filed 41 days after the complaint was filed, appellant attached the affidavit of Dr. Jose Evangelista, who averred that he had reviewed the records of appellees' treatment of appellant and had determined that appellees were negligent in failing to remove a catheter guide wire and in failing to so inform appellant. The trial court dismissed the complaint on the basis that Dr. Benitez's deposition testimony did not satisfy the requirements of OCGA § 9-11-9.1(a) and that appellant could not amend the action to add Dr. Evangelista's affidavit because the original complaint did not include the language required by OCGA § 9-11-9.1(b).

1. Contrary to appellant's contentions, the deposition did not meet the requirement of "set[ting] forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim," OCGA § 9-11-9.1 (a), as Dr. Benitez did not identify any negligent act committed by appellees and was unable even to speculate as to the source of the wire. See *Piedmont Hospital, Inc. v. Milton*, 189 Ga. App. 563, 564 (377 SE2d 198) (1988). Thus, the complaint as originally filed was subject to dismissal for noncompliance with OCGA § 9-11-9.1.

2. Alternatively, appellant contends she properly amended her complaint under either OCGA § 9-11-9.1 (b) or (c). The statute permits amendment of a complaint to add the required affidavit only in limited circumstances: (1) if the statute of limitation will expire within ten days and the plaintiff alleges that an expert affidavit could not be prepared because of time constraints (OCGA § 9-11-9.1 (b)); or (2) if the court determines that the plaintiff had the requisite affidavit available before the complaint was filed and the failure to file "was the result of a mistake" (id. at (e)). Paragraph (e) does not apply because Dr. Evangelista's affidavit was dated after suit was filed, and appellant does not contend the affidavit was available prior to filing. See *Cheeley v. Henderson*, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991); compare *Hospital Authority of Fulton County v. McDaniel*, 192 Ga. App. 398 (385 SE2d 8) (1989). Paragraph (b) likewise is inapplicable because appellant did not allege in her original complaint that

she was unable to obtain an affidavit because of time constraints, but instead alleged that the requisite affidavit — the deposition of Dr. Benitez — *was* attached to and filed with the complaint, but the deposition was insufficient.

Appellant maintains that under the liberal amendment provisions of OCGA § 9-11-15, she was entitled to amend her complaint to add the allegations required by OCGA § 9-11-9.1 (b) and then to file a second amendment to add the affidavit as contemplated by paragraph (b). We disagree, for in *Cheeley*, supra, the Supreme Court held that the contemporaneous filing requirement is mandatory and that the filing of an insufficient affidavit cannot be cured by amendment unless the requirements of paragraph (e) are met. As the court noted, paragraph (e) expressly states that the failure to comply with the contemporaneous filing requirement cannot be cured by amendment under OCGA § 9-11-15 unless the affidavit was available prior to the filing of the complaint but was not filed due to a mistake. *Cheeley*, supra at 499. The legislature clearly has limited the manner in which OCGA § 9-11-15 is applied in malpractice cases and has authorized amendment only in certain limited circumstances not present here.

Although this court reached a contrary result in *Thompson v. Long*, 201 Ga. App. 480 (411 SE2d 322) (1991), that case involved a pro se plaintiff and applied the less stringent pleading standard used in pro se cases but not applicable here. Moreover, the *Thompson* plaintiff clearly had intended from the outset to proceed

under paragraph (b) — i.e., to file the complaint just before the statute of limitation expired and then to obtain and file the affidavit thereafter — but neglected to add the "magic language" in her pleading, id. at 482, whereas here appellant originally filed a deposition she alleged met the requirements of paragraph (a). Thus, this case, like *Cheeley*, "involves the misinterpretation of OCGA § 9-11-9.1 (a).... Because of the misinterpretation, the requisite affidavit [filed with the complaint] failed to comply with OCGA § 9-11-9.1 (a)." (Punctuation and citation omitted.) *Cheeley*, supra at 498 (3). Accordingly, the trial court properly granted appellees' motions to dismiss.

3. Since the trial court did not rule on appellant's contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990).

Judgment affirmed. McMurray, P.J., and Cooper, J., concur.

APPENDIX E1

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, OCTOBER 01, 1992

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A92A0964

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF
THE STATE OF GEORGIA
Clerk's Office, Atlanta OCT 1 1992

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin, Clerk.

APPENDIX F1

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA
DATE: SEPTEMBER 08, 1993

Hunter S. Allen, Jr.
ALLEN & PETERS
Two Midtown Plaza, Suite 1700
1360 Peachtree Street, N.E.
Atlanta Ga 30309

Case No. S93C0114
CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

COURT OF APPEALS CASE NO. A92A0964

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., and Carley, J., who dissent.

_____

_____

_____

Sincerely,

Sherie M. Welch, Clerk

APPENDIX G1

SUPREME COURT OF GEORGIA

ATLANTA OCTOBER 01, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93C0114

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Sherie M. Welch, Clerk.